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No. 82-276

In the Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND L. DIRKS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether nonpublic information revealing that a publicly traded company has vastly overstated its reported assets and earnings is "material" inside information, when the information is specific, known to come from insider sources, and known to be substantially accurate.

2. Whether the view of the Commission and the court below that confidants ("tippees") of corporate insiders assume their insiders' duties to disclose material inside information prior to trading on the basis of such information is consistent with dictum regarding tippee liability in *Chiarella* v. *United States*, 445 U.S. 222 (1980).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1-A-41) is reported at 681 F.2d 824. The opinion of the Securities and Exchange Commission (Pet. App. B-1-B-27) is reported at 21 SEC DOCKET 1401.

JURISDICTION

The judgment of the court of appeals (Pet. App. C-1-C-2) was entered on March 29, 1982. A petition for rehearing was denied on May 19, 1982 (Pet. App. C-3-C-5). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Raymond L. Dirks is a professional securities analyst. In March 1973, petitioner was vice-president of a securities broker-dealer firm registered with the Commission under the Securities Exchange Act of 1934. He specialized in providing investment advice about insurance company stocks to institutional investors.

Equity Funding Corporation of America ("Equity Funding") was an insurance holding company. On March 28, 1973, the Commission stopped all trading in Equity Funding securities based upon evidence that the company had vastly overstated its reported assets and earnings. Shortly thereafter, Equity Funding filed for bankruptcy, and almost two-thirds of the insurance reportedly issued by the company was exposed as fictitious; thus, the information in the market in which the company's securities had been trading was grossly inaccurate.

2. On January 22, 1981, at the conclusion of a lengthy administrative proceeding, the Commission entered an order censuring petitioner [1] for selectively disseminating material nonpublic information concerning massive fraud within Equity Funding to institutional investors and their advisors.[2] Based upon this information, petitioner's tippees sold over $17

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[1] Censure is the mildest remedy available to the Commission in an administrative proceeding; it imposes no restrictions on a respondent's activities.

[2] The Commission's findings were based upon its independent review of a 13,000 page factual record in an adversary proceeding conducted by an administrative law judge (Pet. App. B-2). The Commission's decision affirmed the findings of the administrative law judge but reduced the sanction he would have imposed from a 60-day suspension from employment in the securities business to a censure (*id.* at B-2, B-26).

million of Equity Funding securities, mostly in trades on the New York Stock Exchange, just before the collapse of the company rendered those securities worthless. The Commission found that these sales violated antifraud provisions of the federal securities laws,[3] and that petitioner had willfully aided and abetted the violations.[4]

In particular, the Commission found that on March 6 and 7, 1973, petitioner was made privy to detailed information concerning the massive fraud within Equity Funding by Ronald Secrist, a former Equity Funding vice-president, who sought petitioner's assistance in publicly exposing the fraud (Pet. App. B-3-B-4). Mr. Secrist informed petitioner that at least one-third of the insurance reportedly issued by Equity Funding was fictitious, described in detail how top-echelon management had been able to conceal the fictitious nature of this insurance, and provided petitioner with names of other Equity Funding insiders who could corroborate the existence of the fraud (*ibid.*). Petitioner agreed to help Mr. Secrist, stating that he had contacts at the *Wall Street Journal* who would have the ability to expose the fraud publicly, provided that it could be substantiated (*ibid.*; J.A. 163-164; R. 463).[5]

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[3] Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5.

[4] The Commission found that petitioner acted with scienter in assisting his clients to violate the law (Pet. App. B-20-B-25), and the court of appeals affirmed this finding (*id.* at A-35-A-40).

[5] "J.A. ——" and "R. ——" refer to the joint appendix and certified record filed in the court of appeals.

During the week of March 12, 1973, before contacting the persons named by Mr. Secrist or law enforcement authorities, petitioner began to convey the information obtained from Mr. Secrist to a select group of institutional investors (Pet. App. B-5). He quickly ascertained the identities of clients that were interested in Equity Funding and began to contact them (Pet. App. B-5); he conveyed only a "soft story" about accounting irregularities at the company to those who he determined did not own Equity Funding securities.[6] One client to whom petitioner did reveal the fraud at that time, the Boston Company Institutional Investors, Inc. ("Boston"), sold $1.2 million of its clients' holdings of Equity Funding securities based upon this information alone (*ibid.*). Boston then directed $4,000 in commission business to petitioner's firm and repeatedly obtained further information from petitioner (Pet. App. B-5-B-6 & n.9; J.A. 1063).

The following week, on Monday, March 19, 1973, petitioner began to substantiate the key portions of Secrist's information (Pet. App. B-6). While Equity Funding's top management denied the existence of fraud,[7] six Equity Funding insiders to whom peti-

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[6] *In re Boston Co. Institutional Investors, Inc.*, [1978] Fed. Sec. L. Rep. (CCH) ¶ 81,705 at 80,842; *id.* at 80,835-36, 80,845. For example, the administrative law judge who presided over the trial proceedings found that, on March 26, 1973, Mr. Dirks answered inquiries about Equity Funding made by officials of Fidelity Management and Research, an advisor in Boston, "but he did not relate the fraud allegations to them, because he learned they did not own any [Equity Funding] stock." *Id.* at 80,845.

[7] Petitioner decided to confront Equity Funding's management after being advised by one of his tippees that he could get into serious trouble by selectively disclosing non-public

tioner had been directed by Mr. Secrist reported to petitioner detailed, often first-hand evidence of widespread fraud at the company (*id.* at B-9). One of them, Equity Funding's former controller, confessed to petitioner that he had falsified ledgers in 1970 to conceal the company's fictitious insurance, adding that he thought he would be " 'going to jail' " for his participation in the company's fraud (*id.* at B-6; J.A. 320). During the week, Mr. Dirks reported this information to a *Wall Street Journal* reporter, who commenced an independent investigation of the matter (Pet. App. B-7; J.A. 552-555, 946-947).

As he substantiated the fraud, petitioner continued privately to divulge its existence to clients and potential clients. On March 20, petitioner updated Boston, informing its officials of the controller's confession (Pet. App. B-6). The following day, Boston sold its clients' remaining holdings of Equity Funding securities for $7.5 million and promised to direct $25,000 in commission business to petitioner's firm (*id.* at B-6-B-7). Between Friday, March 23, and Monday, March 26, 1973, petitioner supplied the information to four other advisors of institutional investors, expressly stating to one, John W. Bristol & Co., that a halt in trading was imminent and that if he were in its position " 'he would sell the stock' " (Pet. App. B-9-B-11). On March 26, Bristol sold more than $8 million of Equity Funding securities; the other three advisors sold more than $1 million of the company's securities (*ibid.*).

Up to this time, petitioner had made no attempt to contact the New York Stock Exchange, the Commis-

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information about the company (Pet. App. B-17 n.33; J.A. 990) and that he should therefore confront the management with the allegations (J.A. 981).

sion or any other law enforcement authority. Meanwhile, the *Wall Street Journal* reporter to whom petitioner earlier had spoken had conducted an independent investigation and had arranged for a meeting with the Commission's staff to report the results of his own investigation.[8] At the reporter's urging, petitioner attended the meeting, which took place on March 27, 1973 (Pet. App. B-11).

During that meeting, the New York Stock Exchange halted trading in Equity Funding stock (*ibid.*; J.A. 566, 972-974). Based upon the information obtained from petitioner and others, on the next day, March 28, 1973, the Commission suspended all trading in Equity Funding securities and a week later filed an injunctive action against the company and several of its officials (*ibid.*; J.A. 929).

Based on these findings, the Commission rejected petitioner's contention that the information he had supplied to his clients was "merely rumors and unverified allegations" and not "material facts" within the antifraud provisions of the federal securities laws (Pet. App. B-14). The Commission found that the information that petitioner tipped to his clients concerning Equity Funding sharply contrasted with the information that was publicly available in the marketplace (*id.* at B-14-B-15, B-20-B-21). Petitioner's information was "specific and detailed," was from a known inside source, and, by March 23, 1973, had been repeatedly corroborated by "detailed, often first-hand" information from other Equity Funding

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[8] Although the reporter from the *Wall Street Journal* was not yet ready to publish a story about Equity Funding, he was so alarmed by the results of his investigation that he believed the Commission should be informed immediately (Pet. App. B-11; J.A. 121, 947-954).

insiders (*id.* at B-14-B-15, B-17). "Few disclosures," the Commission found, "could have had a greater impact on the quality of an investment, or on the stability of the market for it, and Dirks and his tippees clearly appreciated that fact" (*id.* at B-17). The Commission stressed that the information was "clearly" and "unquestionably" material during the period from March 23 to March 26 (*id.* at B-14-B-15), and that petitioner's censure was warranted on the basis of the more than $8 million of trades that he fostered during that brief period alone (*id.* at B-26 n.54).

The Commission also rejected petitioner's contention that, under this Court's holding in *Chiarella* v. *United States*, 445 U.S. 222 (1980), neither he nor his tippee-clients had a duty to disclose their inside information prior to selling Equity Funding securities (Pet. App. B-11-B-12, B-21 n.42). The Commission found *Chiarella* consistent with its interpretation that "corporate insiders" have a duty to disclose or abstain from trading in the securities of their corporation on the basis of material inside information and that "tippees," such as petitioner and his clients, "who receive non-public, material information from insiders become 'subject to the same duty as [the] insiders' " (Pet. App. B-11-B-12 & n.21, B-21 n.42, quoting *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228, 237 (2d Cir. 1974)). The Commission found that, irrespective of any privilege they may have had to disclose Equity Funding's fraud, petitioner's insider sources had a duty not to profit from use of their information and that petitioner had "assumed" a similar duty "in dealing with them" (Pet. App. B-20-B-21 & n.42).

In view of mitigating circumstances, including petitioner's reporting of the fraud to the *Wall Street*

Journal and subsequently to the Commission, the Commission determined to impose only a censure against petitioner (Pet. App. B-26). The Commission noted that some sanction was warranted because, despite his efforts to assist Mr. Secrist in publicizing the fraud, petitioner had advised clients of the fraud privately so that they would be able to "trade on the information well before it would become public" (*id.* at B-26 n.52).

3. On March 29, 1982, the court of appeals (Wright, Tamm, and Robb, J.J.) entered a judgment without accompanying opinion denying, "for the reasons stated by the Commission in its opinion," petitioner's petition for review of the Commission's censure order (Pet. App. C-1-C-2).[9] Judge Tamm dissented from the judgment. On April 27, 1982, petitioner requested rehearing and suggested rehearing en banc.

On May 18, 1982, the court of appeals issued an opinion authored by Judge Wright (Pet. App. A-1-A-41). Judge Robb concurred in the result, and Judge Tamm dissented; neither filed a separate opinion. Judge Wright stated that petitioner's censure should be affirmed on the theory expressed by the Commission that petitioner and his tippees had assumed the "disclose-or-abstain" obligations of their insider sources (*id.* at A-15-A-27, citing *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, *supra*, 495 F.2d 228). Judge Wright added that, even apart from the obligations petitioner acquired under the Commission's theory, petitioner, as an employee of a broker-

[9] The judgment also stated "that petitioner breached his duty to the Commission and to the public not to misuse insider information and that he was compensated for so doing" (*ibid.*).

dealer, had ethical duties not to assist his "clients [in] dump[ing] fraudulent securities on an uninformed public" (Pet. App. A-3, A-27-A-31).

On May 19, 1982, petitioner's request for rehearing and for rehearing en banc was denied (Pet. App. C-3-C-5).

ARGUMENT

The decision of the court of appeals is correct and conflicts with no decision of this Court or any other court of appeals. Moreover, because the opinion of the court of appeals represents the views of a single judge and the court's decision appears to turn on a unique set of facts, the decision has limited precedential value. Accordingly, further review is unwarranted.

1. Contrary to petitioner's contention (Pet. 11-14, 21-24), the decision of the court of appeals does not raise issues of great importance regarding the proper role of securities analysts in our capital markets. This case does not involve an analyst's customary functions of collecting, distilling and analyzing publicly available information or contacting corporate management for " 'tidbits' " of immaterial information to fill in " 'interstices in analysis' " (Pet. App. B-18, quoting *In re Investors Management Co.*, 44 SEC 633, 646 (1971)). It involves the rare, perhaps once-in-a-lifetime case, in which an analyst is solicited by a corporate insider to assist in publicizing an unquestionably material story concerning a gigantic corporate fraud. Petitioner did not obtain information through routine research. He admitted that Mr. Secrist, his initial insider source, disclosed to him the entire story of the Equity Funding fraud and that his contacts with other insiders did not add " 'anything further to the allegations that Secrist had made, essentially' " (Pet. App. B-19). Because the decision in this case is an atypical one

which turns on its own "sensational facts" (Pet. App. A-2), it is both a decision of limited precedential value and a poor candidate for defining the proper role of the securities analyst.[10]

2. This case does not, as petitioner argues (Pet. 21), present the issue whether "unverified rumors" and "allegations" of fraud constitute "material facts" under *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976).[11] The Commission found, and the

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[10] Moreover, petitioner's fellow professionals have stated that use of inside information is unnecessary to their role of providing competent securities analysis. *Wall Street Analysts Agree: Raymond Dirks Blew It, The Commercial and Financial Chronicle*, April 19, 1973, at 1, 11; *New Guidelines on Inside Information, Financial Analysts Journal*, January/February 1974 at 20; W. Chatlos, *Financial Analyst's Handbook* 74-86 (Levine, ed., 1975). See also *New York Stock Exchange Company Manual* A-21 (1977) ("The competent analyst depends upon his professional skills and broad industry knowledge in making his evaluations and preparing his reports and does not need the type of inside information that could lead to unfairness in the marketplace"); W. Chatlos, *Financial Analyst's Handbook, supra*, 75 ("survival of the marketplace will depend, in no small way, on the curtailment of the frequency of abuse of inside information * * *"); *id.* at 74.

Accordingly, securities analysts have declared that use of inside information is an unethical professional practice. See Financial Analysts Federation, *Code of Ethics and Standards of Professional Conduct*, Standard II (as amended, May 9, 1982).

[11] Petitioner argues that in order to meet the materiality test in *TSC Industries, Inc.* v. *Northway, Inc.*, *supra*, 426 U.S. 438, information must not only be important to the reasonable investor but also sufficiently "verified" for one to have " 'full confidence' " in its accuracy (Pet. 21, quoting *Financial Industrial Fund, Inc.* v. *McDonnell Douglas Corp.*, 474 F.2d 514 (10th Cir.), cert. denied, 414 U.S. 874 (1973)). But the cases on which petitioner relies for this proposition

court of appeals affirmed, that during the period of March 23 through March 26, 1973, just before trading was halted, the information petitioner tipped "was far more than rumor and unverified allegations";[12] it was specific, detailed, from known inside sources and highly reliable (Pet. App. B-14-B-15; *id.* at A-34-A-35).[13]

The Commission predicated its censure of petitioner on his misconduct during the March 23-26 period

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(Pet. 21 & n.6) address the very different issue when important corporate information is "ripe" for public disclosure by a corporation—that is, when information is verified and there is no valid corporate purpose for its nondisclosure. The cases do not even suggest that corporate insiders and their privies are free to trade on information that their company withholds as not "ripe" for disclosure when that information nonetheless meets the *Northway* test of materiality. See Brudney, *Insiders, Outsiders and Informational Advantages under the Federal Securities Laws*, 93 Harv. L. Rev. 332, 336-337 (1979) ("Brudney").

[12] The Commission found, and the court of appeals affirmed (Pet. App. A-35, B-14-B-15 & n.30, B-21-B-22, C-2), that the "depth and scope of the information" available to petitioner was not comparable to the "rumors" about Equity Funding that were at issue in *Pachter* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 444 F. Supp. 417, 422 (E.D.N.Y.), aff'd mem., 594 F.2d 852 (2d Cir. 1978) and *Wiener* v. *Oppenheimer & Co.*, [1979] Fed. Sec. L. Rep. (CCH) ¶ 96,764 at 95,001 (S.D.N.Y. 1979). Accordingly, petitioner's reliance (Pet. 23) on these cases is misplaced.

[13] As noted by Judge Wright, as early as March 20th petitioner had "substantiated the key portions of Secrist's allegations" and by March 23rd "there is *no doubt* that the information he possessed and passed on to his clients had enough specificity to satisfy [Section 10(b)] and Rule 10b-5. He knew of specific blocks of false insurance, and he had a very detailed idea of how Equity Funding had gone about fooling its auditors and regulators" (Pet. App. A-8, A-34-A-35, emphasis supplied).

when the information was "obviously" and "unquestionably" material (Pet. App. B-14-B-15, B-26 n.54). Accordingly, petitioner's contention (Pet. 23) that not all of Mr. Secrist's original charges were ultimately proved true is irrelevant. "[D]uring the crucial March 23-26 period [petitioner's tips] related exclusively to charges *that he knew * * * were substantially true*" (Pet. App. A-34 n.24, emphasis supplied). Likewise irrelevant is petitioner's contention (Pet. 22) that the early reactions of his tippees lacked uniformity; the record demonstrates that those who were tipped during the March 23-26 period "tended to sell whatever Equity Funding stock they could" (Pet. App. A-34). Finally, the obvious materiality of the information during the critical period is not undercut, as petitioner suggests (Pet. 22-23), by the absence of any law enforcement action until March 27. Information may be "material" in the sense that it would be important to a reasonable investor and yet lack the substantiation needed to commence a law enforcement action. Moreover, not until March 27th when petitioner approached the Commission for the first time did the Commission obtain information comparable to that which petitioner possessed (Pet. App. B-11 n.18).

In any event, a finding of materiality, such as the Commission made here, requires "delicate assessments" of the inferences that a reasonable investor would draw from a particular set of facts and, therefore, is a matter "peculiarly * * * for the trier of fact." *TSC Industries, Inc.* v. *Northway, Inc., supra*, 426 U.S. at 450 (footnote omitted). Where, as here, a court of appeals finds that substantial evidence in the record supports such a finding by an agency (Pet. App. C-1-C-2), review by this Court is unwarranted.

Universal Camera Corp. v. *NLRB*, 340 U.S. 474, 487-492 (1951) (the question whether substantial evidence supports an agency's finding belongs to the court of appeals); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 276 (1949) (concurrent findings of fact will not be disturbed).

3. Contrary to petitioner's contention (Pet. 14-21), the Commission's finding that petitioner assumed the "disclose-or-abstain" duties of his insider sources does not conflict with this Court's decision in *Chiarella* v. *United States*, 445 U.S. 222 (1980). Indeed, dictum in *Chiarella* reaffirmed traditional prohibitions against trading by insiders and their tippees on *inside* information—nonpublic information concerning the assets or earnings of a company.[14] *Chiarella* held only that a person incurs no general duty to disclose under Section 10(b) of the Securities Exchange Act of 1934 from his "mere possession of nonpublic *market* information"—that is, information generated in the securities markets about the supply and demand for particular securities. 445 U.S. at 231, 235 (emphasis supplied).[15]

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[14] *Chiarella* has been interpreted as leaving undisturbed traditional prohibitions against trading by insiders and their tippees on inside information. See *Elkind* v. *Liggett & Myers, Inc.*, 635 F.2d 156, 165 (2d Cir. 1980); *Securities and Exchange Commission* v. *Lund*, [1981-1982] Fed. Sec. L. Rep. (CCH) ¶ 98,428 (C.D. Ca. 1982). See also *Feldman* v. *Simkins Industries, Inc.*, 679 F.2d 1299, 1304 (9th Cir. 1982) (discussing *Chiarella* holding); *Staffin* v. *Greenberg*, 672 F.2d 1196, 1202 (3rd Cir. 1982) (same); *O'Connor & Assoc.* v. *Dean Witter Reynolds, Inc.*, 529 F. Supp. 1179, 1187 (S.D.N.Y. 1981) (same).

[15] This Court emphasized that Chiarella was "not a corporate insider and he received no confidential information * * *" from the companies the shares of which he traded. 445 U.S. at 231.

In reaching its holding in *Chiarella*, this Court recognized that administrative and judicial decisions had established that tippees of corporate insiders can acquire the duties of their tippors under Section 10(b) to disclose material inside information before trading on the basis of such information. 445 U.S. 226-230. This Court reasoned that to recognize a similar general duty to disclose nonpublic market information, in effect completely prohibiting use of such information, would be inconsistent with the regulatory pattern of the Securities Exchange Act. 445 U.S. at 233-235. This Court concluded:

> We hold that a duty to disclose under § 10(b) does not arise from the mere possession of nonpublic *market information*. The contrary result is without support in the legislative history of § 10(b) and would be inconsistent with the careful plan that Congress has enacted for regulation of the securities markets.

445 U.S. at 235 (emphasis supplied).

Neither this holding nor its underlying logic conflicts with the theory of tippee liability involved here. The Court made clear in *Chiarella* that the source of the information, a prospective tender-offeror, was, under the scheme of the Act, free itself to trade on the information (within certain limits) and also to disclose information about its prospective tender offer to selected institutional investors. 445 U.S. at 233-234. In *Chiarella*, thus, there was no disclosure duty to be inherited by tippees. Here, petitioner's sources, present and former corporate employees, were, whatever their obligation to disclose the fraud to proper authorities, under a duty not to trade on the information while it remained undisclosed. As we have al-

ready pointed out, this Court in *Chiarella* noted with favor decisions which had held that tippees may inherit such obligations of their insider sources either to disclose inside information or abstain from trading on the basis of it.

The discussion of tippee liability in footnote 12 of the *Chiarella* opinion does not, as petitioner argues (Pet. i, 18), purport to limit the circumstances in which a tippee can assume a disclose-or-abstain duty to those instances in which he receives inside information through the breach of an insider's fiduciary duty. The Court's careful notation that a tippee's disclosure obligation "has been viewed" as arising from his role as a participant after the fact in his insider's breach of duty (*ibid.*) negates any suggestion that the Court intended to foreclose other theories of tippee liability. This is confirmed by the Court's favorable reference in the same footnote to *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, *supra*, 495 F.2d at 237-238, a case in which the court of appeals found liable a tippee who acquired inside information properly rather than through a breach of an insider's duty.[16] This view of tippee liability is consistent with that espoused

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[16] Petitioner contends (Pet. 20-21) that the decision of the court of appeals in this case is "sharply at odds" with the decision of the Second Circuit in *Walton* v. *Morgan Stanley & Co.*, 623 F.2d 796 (1980). But *Walton* was a diversity case involving an interpretation of state law, not as the Second Circuit's decision in *Shapiro*, a case involving an interpetaton of the antifraud provisions of the federal securities laws. Accordingly, there is no need for this Court to review the present decision for consistency with *Walton*. See *Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

by courts,[17] commentators,[18] and the proposed *Federal Securities Code*.[19]

4. Contrary to petitioner's contention (Pet. 14-17), there is no reason for this Court to review Judge Wright's alternate theory that petitioner, as an employee of a broker-dealer firm registered with the Commission, had a special duty to disclose or abstain from trading. As demonstrated above, the Commission's theory, which was affirmed by the court of appeals, fully supports the censure that was entered against petitioner. Further, the Commission did not consider Judge Wright's alternate theory in its decision, nor did it present that theory to the court of appeals (Pet. 15-16). See *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).[20]

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[17] See, *e.g.*, *Feldman* v. *Simkins Industries, Inc.*, *supra*, 679 F.2d at 1304 (the test for "insider status is whether the person has *access* to confidential information intended to be available only for a corporate purpose and not for the personal benefit of anyone") (emphasis supplied).

[18] Langevoort, *Insider Trading and the Fiduciary Principle: A Post-Chiarella Restatement*, 70 Cal. L. Rev. 1, 30-31 (1982); Brudney, *supra*, 93 Harv. L. Rev. at 347-348 & n.82; Subcommittees of the ABA Section of Corporation, Banking and Business Law, Comment Letter on Material Nonpublic Information (Oct. 15, 1973), reprinted in BNA, *Securities Regulation & Law Report* No. 233, pp. D-5-D-6 (Jan. 1974).

[19] The ALI *Federal Securities Code* (Proposed Official Draft 1980) defines the term "insider" to include "any person" who acquires information from a present or former corporate official or employee with knowledge of its source. Section 1603(a), (b) and Comments 1 and 7.

[20] Petitioner speculates (Pet. 18 & n.4) that, because the judgment entered on March 29, 1982, articulated Judge Wright's alternative view, it is unclear whether the court of appeals intended to affirm on the basis of the Commission's

CONCLUSION

The petition for a writ of certiorari should be denied.*

Respectfully submitted,

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theory. Petitioner's speculation ignores, however, the explicit statement in the judgment that the petition for review was denied "for the reasons stated by the Commission in its opinion * * *" (Pet. App. C-2).

* The Solicitor General authorizes the filing of this brief. The Solicitor General is of the view that the holding of the court of appeals is in conflict with this Court's decision in *Chiarella* v. *United States*, 445 U.S. 222 (1980). The information about the ongoing criminal scheme, obtained by a former employee of Equity Funding and passed on to petitioner Dirks, was not "inside" information or any other form of "confidential" information. See *Roberts* v. *United States*, 445 U.S. 552, 557-558 (1980); compare *Cady, Roberts & Co.*, 40 S.E.C. 907, 912 (1961). Petitioner Dirks was not under a

duty to disclose that information before trading with it or passing it on. He was subject to no fiduciary relationship with other traders (*Chiarella* v. *United States*, *supra*, 445 U.S. at 228), there was no element of misappropriation or other misconduct in obtaining or transmitting the information (*id.* at 239-245) (Burger, C.J., dissenting), and the information was "legally available to others" through the exercise of "diligence or acumen" (*id.* at 251-252 & n.2) (Blackmun, J., dissenting). In these circumstances, there is no basis for viewing petitioner's conduct as fraudulent under the federal securities laws. The Solicitor General also is of the view that the decisions of the SEC and the court of appeals have a potential adverse effect on federal criminal law enforcement.

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